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In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

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v.

HELMERICH & PAYNE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above case on November 15, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the district court appear at R. 73–85. The district court did not deliver an opinion. The opinion of the circuit court of appeals (R. 115–119) is reported at 138 F. (2d) 705.

JURISDICTION

The judgment of the circuit court of appeals was entered November 15, 1943 (R. 119). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Prior to the effective date of the Fair Labor Standards Act respondent paid certain employees a regular wage for each eight hour shift, called a tour, regardless of the number of hours worked in the week. In order to avoid paying higher rates for overtime under the Act, respondent caused these employees to execute agreements reciting that it would pay them a stated "regular rate per hour" for the first four hours of each eight hour tour, and one and one-half times that rate for the next four hours. The regular rate recited in the agreement was worked back from the previous tour rate according to a formula designed to ensure that the total tour wage would continue to be the same as before. For example, drillers' helpers who had received $7 a tour were to be paid, according to the recitals of the contract, $0.70 an hour for the first four hours, or $2.80, and $1.05 an hour for the next four hours, or $4.20, making a total of $7. In fact, however, respondent continued to keep its records on a tour basis and to pay the tour wage even though less than eight hours were worked.

Section 7 of the Act requires that an employee employed in excess of forty hours in any week shall be compensated at a rate "not less than one and one-half times the regular rate at which he is employed." When respondent's employees worked a sixth, seventh or eighth tour (*i. e.*, 48, 56, or 64 hours), they were paid the tour rate as before. The question presented, therefore, is whether the employees who received the same tour rate for tours worked in excess of the statutory maximum as for the first five tours were being paid one and one-half times their "regular rate" of pay. This depends on whether the rate for the first four hours of each tour, designated in their contracts as the "regular rate", is the "regular rate" for the purposes of Section 7 notwithstanding that it was never the actual basis of the employees' compensation.

2. Respondent caused a number of its employees to enter into agreements setting forth a so-called "base or regular rate per hour" for the first forty hours and promising to pay one and one-half times that rate for overtime hours; in addition, respondent stated in the agreement that if the earnings of an employee at the above rates were less than a stated biweekly salary, it "may advance and loan said employee the difference, which shall apply on future overtime payments; adjustments and accounting to be made on the first day of each year * * * or when said employment ceases" (R. 77–79). This was the contract. In fact, respond-

ent continued to pay the biweekly salary, kept no record of its employees' earnings at the hourly rates, did not pay overtime due in excess of the biweekly salary even though earned, and never collected the so-called "advances."

The question presented is whether this method of payment complied with Section 7 because the contract recital fixed the "regular rate" of pay, or whether, as in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, the "regular" hourly rate should be determined by dividing the number of hours into the weekly salary.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date.
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This case arises on a complaint filed in the district court by petitioner, the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act to restrain violations of the Act (R. 4–9). Respondent is engaged in the production of oil and gas for interstate commerce (R. 73) and its employees admittedly are covered by the Act (R. 82, 89). The issues raised at the trial and in the circuit court of appeals related principally to the validity of respondent's methods of payment for work in excess of the maximum number of hours permitted by Section 7 of the Act.[1] Two methods of payment whose validity the Administrator challenged but which were approved by the district court and circuit court of appeals may be summarized as follows:[2]

The Poxon or split-day plan.[3]—Prior to the

[1] During the first year after the effective day of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[2] Respondent used altogether five different plans for compensating its employees. Of these, an hourly wage plan which followed literally the scheme of Section 7 was held valid, and a straight salary plan was held invalid by the district court on the authority of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. No appeal was taken from these rulings. A third plan, the "X plan," which the circuit court of appeals held invalid, is described in n. 12, *infra*, p. 20.

[3] The methods of payments involved in this case are common throughout the country, having been publicized by trade journals, and have come to be known by various names, sometimes, as in the case of the "Poxon" plan discussed below,

effective date of the Act certain classifications of respondent's employees had worked eight hour shifts, called "tours" and were paid a wage for each tour—$7 to helpers, for example. As a result of the Act they were caused to work under new contracts of employment incorporating the so-called "Poxon" plan of payment.[1] The contracts recited that each tour was divided into two parts, four hours of "regular" time, to be paid for at an

by the names of the men who devised them as means of avoiding the effect of the overtime provisions of the Act.

The straight "Poxon" plan (described pp. 6-9) applied to drilling employees such as drillers, helpers, roustabouts, and so on—from November 1, 1938, up to approximately July 16, 1941 (R. 74, 75, 75–77). The "advance" plan (discussed *infra*, pp. 9–11), first adopted about October 1, 1940 (R. 75–77), applied to lease pumpers, truck-drivers, and their helpers (swampers). Before that date these classes of employees received fixed monthly salaries regardless of hours (R. 75). In July of 1941 respondent adopted a modified version of the "advance" plan (discussed pp. 10–12) for the truck-drivers and their helpers (R. 24–25, 37–38, 77–79), while the lease pumpers were taken out from under the "advance" plan and put under the "X plan." (See p. 20, n. 12.)

[1] A letter in the record (R. 112) from the respondent's attorney states: "This schedule was worked out about two weeks before the law went into effect. It was passed upon and approved by the executive board of the company * * *. Notice was sent to all of the foremen in the field with instructions to notify the men of the change in wage scale. Also, a rubber stamp was made, an imprint of which is herein attached, which was stamped upon the backs of the wage checks over the place for the employee's endorsement thereon." Thus, an employee could not cash his pay check without signifying his acceptance of the plan.

hourly rate called the "regular rate," and four hours of overtime, to be paid for at one and one-half times the regular rate.[1] (R. 74, 75, 75–77.) Admittedly, the so-called "regular" and "overtime" hourly rates had been calculated by applying a mathematical formula to the previous tour rates in order to determine what hourly rates would yield the employees the same tour wage as before (R. 112). For example, the "regular rate" assigned to helpers, who had formerly been paid $7 per tour, was fixed at $0.70 and the "overtime" rate at $1.05 so as to yield them the same $7. The purpose of these contracts was to circumvent Section 7 of the Act by avoiding the payment of higher rates for the hours worked in excess of forty without reducing the wages paid for regular working hours. (R. 74, 75–77, 109–110, 111–112.) Thus, a helper received $7 a tour throughout the week, $42 for a six tour 48-hour week, $49 for a seven tour 56-hour week, etc., exactly the same pay as before the Act, and exactly the same pay for hours in excess of forty as for the first forty hours.

The evidence shows that the contract hourly rates were never used for any practical purpose. No employee was ever paid, nor was the amount due him ever calculated, at the regular and overtime hourly rates set out in the contract as opposed to the wage for a four. When the em-

[1] In the case of other employees who worked 10 or 12 hour tours, the first five hours were classed as "regular" and the remaining five or seven hours as "overtime."

ployees worked a sixth tour, making a total of 48 hours, they were paid the tour wage as on other days; thus, the contract "overtime" rate was not applicable to all the hours after forty. When employees worked two tours in a day (16 hours) (R. 29, 35), they would be paid the tour wage twice and not the contract "regular rate" for four hours and "overtime" for all hours in excess of four. Likewise, there is no evidence that any employee ever received any amount but the tour rate regardless of whether he worked the full eight hour tour or only a part of it; on the contrary, the record supports the inference that employees were always paid for a full tour regardless of the number of hours.[6] Indeed, the company did not even keep records of the hours worked at the hourly rates. The controlling rate for every practical purpose was the tour wage.[7]

[6] Before the Act respondent credited employees with 8 hours for each tour whether they actually worked 8 hours or not (R. 111). Under its Poxon contracts respondent did not record actual daily hours worked, but only days, which it stipulated (R. 16, 18) were to be "deemed to mean a 'tour of duty' consisting of 8 hours work." The district court found that the employees continued to receive the same wages for a like amount of work as before the Act (R. 75).

[7] The contracts recited that the "regular rate" set forth in them should not apply to more than forty hours. Since it applied only to four hours of each tour, this would mean that the contract overtime rates would not be a real basis of payment until after eighty hours of work in a week. There is no contention that the employees ever worked such long hours—over ten 8-hour tours—or that such work was contemplated when the contracts were made.

No higher rates were paid for overtime hours. The contracts, if effective, served only the purpose of enabling the employer to pay the regular tour wage for all hours worked without paying an additional amount for the tours constituting hours in excess of forty as intended by the Act.

The district court (R. 83) and the circuit court of appeals (R. 117) held that under the decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, this system of payment did not violate Section 7.

The "advance" plan.—Prior to the effective date of the Act and for about two years thereafter respondent paid certain of its employees a regular monthly salary regardless of hours worked (R. 75). Subsequently respondent caused these employees to work under agreements setting forth a so-called "base or regular rate" for the first five hours of each ten or twelve hour "tour" and promising to pay one and one-half times that rate for the remaining hours in each tour. This part of the contract, it will be observed, was similar to the Poxon plan discussed above, but this group of employees was never compensated under the simple Poxon plan of payment. Their contracts, in addition, provided that if an employee's earnings at the hourly rates were less than a stated monthly sum, identical in amount with the previous monthly salary (R. 20, 21, 23, 24, 59, 61, 75–77), then respondent would "advance said employee the difference which shall apply on future over-

time payments; adjustment to be made on January 1st of each year and when said employment ceases." (R. 75–77.)

Later respondent changed the arrangement to recite an hourly rate for the first forty hours in the week with time and one-half for overtime. It continued on a biweekly basis the provision for "advances" (R. 77–79, cf. R. 37–38). The latter form of advance plan was in use at the time of the trial.

In fact, each employee working under this plan was paid outright his regular salary and not his earnings at the hourly rate set forth in his contract. In every instance the amount the employee received was the monthly or biweekly total specified in the contract—no more and no less. The pay rolls found in the record which are stipulated to have been typical contain not a single instance of an employee's receiving the exact amount of compensation he would have received had it been computed at the hourly "regular" and "overtime" rates recited in the "advance plan" contracts.* Occasionally, employees worked such hours as would

* The accuracy of this statement may be demonstrated by applying to the hours worked as shown on the payrolls in the record the appropriate contract hourly rates, "regular" and "overtime." For example, under the combination Poxon-advance plan, a truck driver was assigned a "regular" rate of 35 cents an hour for the first 5 hours in a 12 hour tour, with time and a half that rate for the remaining 7 hours (R. 75–77), equivalent to a "tour rate" of $\$5.42\frac{1}{2}$ (5×35, $\$1.75 + 7 \times 52\frac{1}{2}$, $\$3.62\frac{1}{2}$). In a pay period when he

entitle them at the contract hourly rates to compensation in excess of the amounts they had received, but those earnings were never paid (R. 79). When they worked less, no accounting was had of the so-called advances (R. 77, 79). Indeed, respondent's pay-roll records did not even show what sums the employees earned at the hourly rates recited in the contract (R. 49, 51, 65, 67, 69, 71).*

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worked 15 days of 12 hours each, he would have "earned," at these hourly rates, $81.38. Respondent paid him the salary amount of $82.50 (R. 65). Under the second version of the "advance" plan, when truck drivers were assigned an hourly rate of 46 cents an hour for the first 40 hours in each week, with time and a half for the overtime hours (R. 37–38, 77–79), if a driver worked 77 hours one week and 90 the next (R. 69), he would have earned in those two weeks, $43.93 (40×46, $18.40+37×69, $25.53) and $52.90 (40×46, $18.40, +50×69, $34.50) respectively, a total of $96.83. Respondent still paid him $80.80, the amount of the bi-weekly salary (R. 69). And in the last payroll in the record, on respondent's own figures, the employee's earnings at the contract "regular" rate plus time and a half, amounted to $69.23 (R. 71). He was paid $80.80. This payroll is the only one which shows on its face the amount of this discrepancy, the so-called "advance," which was $11.57.

* The six pay roll records to which reference is made in the text were included in the stipulation as typical of respondent's practices. The latest one (R. 71) attempts to show the amounts earned at the hourly rates, but even this pay roll record is not an accurate reflection of what occurred because the total hours shown included a credit of eight hours for days when the employees did not work. It will be observed that this pay roll was for a period after the complaint had been filed and shortly before the trial.

The district court and the circuit court of appeals held on authority of the *Belo* case that this method of payment constituted compliance with Section 7 (R. 83, 117).

REASONS FOR GRANTING THE WRIT

Section 7 of the Fair Labor Standards Act prohibits employing a person in commerce or in the production of goods for commerce for more than forty hours in a week unless he is paid for the overtime work at one and one-half times "the regular rate at which he is employed." Although the Act is five years old, the meaning of the term "the regular rate at which he is employed" gives rise perhaps more frequently than any other provision to difficult and disputed questions of interpretation.

In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, this Court held that where a weekly salary is paid to an employee for fluctuating hours, the "regular rate at which he is employed" is the weekly salary, and that the weekly salary is to be reduced to an hourly rate for purposes of computing overtime by dividing it by the hours worked each week. In *Walling* v. *Belo Corp.*, 316 U. S. 624, the Court held that this principle is not applicable where the employer pays his employees in accordance with a contract which guarantees them a fixed weekly salary and "specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of over-

time work beyond the maximum hours fixed by the Act" (p. 634). The Court concluded that when there was such a contract and when the basic rate set forth in the contract in fact was the basis for the employee's compensation, then the basic contract rate and not the salary was the regular rate of pay.

Several courts have emphasized the words quoted above from the *Belo* case and have held on its authority, without regard to its facts, that the "regular rate" specified in Section 7 may be any rate stipulated by contract not lower than the statutory minimum.[10] The decisions of the district court and the circuit court of appeals in the instant case are the most striking examples of these rulings, for they pressed the supposed rule so far as to decide that such a contract was controlling even though it was established that the basic rate stipulated in the contract had no practical significance. Such rulings result in large measure from the fact that the only difference between the *Missel* and *Belo* cases which the Court expressly mentioned was that "In the contract in that [Missel] case, there is no stated hourly wage and no provision for overtime" (p. 634).

[10] See also *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom*, *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944).

We believe that these decisions are based on a misunderstanding of the *Missel* and *Belo* cases and that they illustrate the need for a clarifying decision. The *Belo* case does not hold that the regular rate at which a man is employed can be fixed by contract for the purposes of Section 7 even though that rate is not the basis of the employee's compensation for his regular hours of work (*i. e.*, the first forty hours). The Court concluded that the hourly rate specified in the *Belo* contract was in fact one of two bases for the employee's compensation. The Court emphasized that the circuit court of appeals had "found that the contracts were 'actual bona fide contracts of employment and that they were intended to, and did, really fix the regular rates at which each employee was employed.'" The opinion answered the Administrator's argument that the hourly rate set forth in the contract was a fiction and not a basis for payment by pointing out (pp. 631–632):

> * * * when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guarantee. The record shows that in such a case, the employee is paid at the rate of $1.00 an hour (150% x $.67) for each hour of overtime. In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling.

And the Court then held that for the first forty hours also the 67 cent hourly rate was the basis for payment, the fluctuation in making up the guarantee being in the amount of the premium for overtime (p. 632). In other words, the *Belo* case decided no more than that an employer who *in fact* pays his employees a regular hourly rate for forty hours and at least one and one-half times that rate for overtime, does not violate the Act by guaranteeing the employees a minimum weekly salary and paying them in accordance with the guarantee, even though they may sometimes work less than the number of hours required to earn it.

The instant case cannot be brought within that ruling. Under the Poxon plan respondent did not attempt to guarantee the employees a minimum weekly salary but paid them only for the number of tours they worked. This fact alone distinguishes the *Belo* holding. *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10); *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.); *Walling* v. *Livernois*, 6 Wage Hour Rept. 672 (E. D. Mich. 1943). Also, since respondent always paid a uniform rate for every tour, it paid no higher rates for tours constituting hours in excess of forty than it paid for the first five tours; despite the statutory command, therefore, no higher rate is paid for overtime work than for work in the normal week of forty hours. In the

Belo case, the Court found that a higher rate was paid for overtime.

Equally significant is the fact that respondent's employees were compensated on the basis of the number of tours worked, or on the basis of the weekly salary, and never on the basis of the "regular rate" which the contracts recited. Under the Poxon plan respondent continued its prior practice of recording the number of tours worked and of paying the established wage for each tour; with few exceptions, it did not even keep records of the daily hours worked or compute the employees' earnings at the contract rate. Under respondent's "advance" plan there was a specified monthly or biweekly salary, but respondent kept no record of its employees' earnings at the hourly rates recited in the contract and, in contradistinction to the practice under the *Belo* plan, never in fact compensated the employees on the basis of the contract rates, or calculated the sums said to have been lent to them. The postulate on which the decision below necessarily is founded is not the ruling in the *Belo* case; it is the premise that an employer is free to fix by contract for purposes of calculating overtime under Section 7 a lower rate than the rate at which the employee is employed during his first forty hours of employment.

That premise, we submit, is plainly unsound. To permit the regular rate to be fixed by contract for the purposes of Section 7 without regard to the rates in fact paid for work during the first forty

hours would frustrate the Act's purpose to discourage overtime employment and deny the established principle that an employee cannot waive by contract the protection of a statute framed for his protection.

Section 7 of the Act aims at spreading employment in times when labor is readily available by making it more expensive to employ a certain number of workers in excess of forty hours a week than it would be to employ a larger number of men for forty hours. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578. If the phrase "the regular rate at which he is employed" is read with this purpose in mind, it is clear that "regular rate" means simply the rate for the ordinary, normal or usual, workweek—under the Act of forty hours—in contrast to the rate for extraordinary, abnormal or unusual hours. This usage accords with a long history of union practice distinguishing between "regular" work and "regular" rates and overtime.

Such a rate, of course, is a rate actually paid.[11] In the instant case, the "regular rate" of employees compensated under the Poxon plan was the tour wage paid for every tour; indeed, since a full tour wage seems always to have been paid, it would be difficult to say, even if the contract had meaning, whether the contract

[11] *Walling* v. *Belo Corp.*, *supra*, is not to the contrary; the Court concluded that the contract rate per hour was the rate actually paid.

rate for the first four hours of a tour or the contract rate for the second four hours was the "regular" rate of pay. Obviously, the only real regular hourly rate for the tour is the average of the two. And the "regular rate" of employees under the "advance" plan was their biweekly or monthly salary. They were paid exactly that salary—no more and no less. The record contains not a single instance of an employee's receiving the exact amount of compensation he would have received had it been computed at the hourly rates recited in the contract. The regular salary actually paid can easily be reduced to hourly rates if necessary for the purpose of computing the overtime compensation due. Cf. *Overnight Motor Co.* v. *Missel, supra.*

To permit an employer to stipulate in a contract, contrary to fact, what shall be the regular rate for purposes of computing overtime payments also denies the established principle that employees may not waive their rights under the Act. This principle applies, of course, to any contract by which an employee expressly waives in advance his right to premium pay for overtime under Section 7. *Overnight Motor Co.* v. *Missel, supra,* at 577; *D & L Production Co.* v. *Cuniff,* 165 S. W. (2d) 933 (Tex. 1942); cf. *Fleming* v. *Warshawsky & Co.,* 123 F. (2d) 622, 626 (C. C. A. 7); *United States* v. *Morley Const. Co.,* 98 F. (2d) 781, 789 (C. C. A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States for use of Harrington,* 305 U. S. 651. The contracts involved in the present case are nothing

more than attempts to write the substance of such a waiver in other verbiage.

Under the Poxon plan it was recited in the employees' contracts that instead of receiving $7 for an eight hour tour, they should receive a so-called "regular rate" or $.70 an hour for the first four hours of each tour and an overtime rate of $1.05 an hour for the next four, a total of $7; in fact, since they were never paid at the hourly rates and always received $7 a tour, i. e., $.87½ an hour, all that they were doing by the contract was waiving any higher rate of pay for hours over forty. The subterfuge is even more transparent in other applications of the Poxon plan. Some of respondent's employees, according to their contracts, worked five hours of "regular" time and seven hours of "overtime" in each shift. Under other variations, not present in this case, but nevertheless illustrative of its substance, the first hour of the week or of each shift is designated to be paid for at the "regular" rate and the remaining hours at "overtime" (see *Walling* v. *Alaska Pacific Consolidated Mining Co.*, Civ. No. 461, W. D. Wash.; *Walling* v. *Arctic Circle Exploration Co.*, Civ. No. 507, W. D. Wash.).

Under the "advance" plan the contract stated a regular hourly rate of pay, provided for payment of a regular salary, and recited that any payments in excess of the earnings at the hourly rates should be treated as a loan; here again, since those earnings were not calculated and the

loans were not collected, the contract in truth had no substance except to waive the employee's right to a higher rate of pay for overtime employment.

The *Belo* case does not uphold such contracts; the Court held that the "regular rate" recited in that contract had real meaning in determining the employees' compensation. (See pp. 14–15, *supra.*) The decision below, which validates the Poxon plan and the advance plan, raises new and disturbing questions in the administration of the Act.[12]

The prevalence of such contracts emphasizes the importance of a clarification of the issues discussed above. The Poxon plan was circulated by the American Mining Congress to its members and, despite the Administrator's express announcement of its illegality in 1940, in 1942 it was reported to the

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[12] The consistent aim of respondent's contracts, the avoidance of Section 7, is illustrated by its treatment of the lease pumpers. At first they received fixed monthly salaries regardless of hours (R. 75). Then they signed "advance" contracts for Poxon hourly rates and the same salaries (R. 75–77). Finally, respondent put them under the "X" plan, which the circuit court of appeals held invalid. Under that plan the employees stipulated that their regular rate was whatever figure was required to enable the employer to say that he was paying overtime without in fact actually paying anything in addition to the weekly salary (R. 80–82). This was done by including in the contract the following formula:

"Let X equal my regular or base hourly wage for each work week. X shall then be determined by multiplying X by the number of hours in each week which I work up to the first 40 and adding to it the number of hours worked in said work week in excess of said 40 hours time[s] 3X 2, which shall equal the compensation I receive for that week."

Administrator that the most frequent violation of the Act in the Western States and in Alaska grew out of its use. Other employers' associations and services have publicized similar contracts reciting a regular hourly rate of pay without regard to the actual wages paid as being methods of avoiding the payment of higher rates for overtime without decreasing the actual rate of pay for normal hours. The use of such contracts in their various forms is increasing.

The uncertainty and confusion prevailing in the inferior courts emphasizes the need for a decision by this Court upon questions of such importance even though, strictly speaking, there is no conflict between the circuits. A number of courts have declared that compliance with Section 7 under the *Belo* case depends on whether there is a contract of employment stipulating a regular rate of pay, thus strongly suggesting (although not actually holding) that the actual rate of pay does not control. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Lofton*; 136 F. (2d) 359 (C. C. A. 10), certiorari denied, No. 222, October 18, 1943; *Green* v. *Riss & Co.*, 45 F. Supp. 648 (W. D. Mo.); *Walling* v. *Cumberland & Liberty Mills Co.*, 5 Wage Hour Rept. 641 (S. D. Fla. 1942). Other courts, like the court below, have followed the

suggestion and actually held that the contract rate is determinative of the "regular rate" for purposes of Section 7 even though a different rate in fact was paid. *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom. Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed, 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944). For reasons set forth above, we believe that these decisions do not apply the *Belo* case correctly but were wrongly decided. Our view has been adopted in another group of cases holding that the *Belo* decision should not be carried beyond the facts before the Court and that the contract rates are not controlling unless they bear at least a reasonable relation to the wages paid. *Walling* v. *L. J. Mueller Furnace Co.*, 50 F. Supp. 561 (E. D. Wis.); *Walling* v. *Highway Express, Inc.*, 6 Wage Hour Rept. 363 (W. D. Tenn. 1943); *Walling* v. *Malone and Hyde, Inc.*, 6 Wage Hour Rept. 750 (W. D. Tenn. 1943); and see the statement in *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, 137 F. (2d) 176, 181, (C. C. A. 5) that "the regular rate is a factual element of wages."

Likewise there are conflicting decisions as to whether the promise of a weekly salary is an element necessary to the validity of a contract fixing the regular rate at a lower sum than the wages actually paid. In *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453, the Circuit Court of Appeals for the Tenth Circuit relied upon the absence of such a provision as the ground for distinguishing the *Belo* contract from the contract before it. Accord: *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.). In the instant case by approving the Poxon plan it rendered a contrary decision. See also *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 6 Wage Hour Rept. 1117 (M. D. Ala. 1943).

This confusion among the lower courts upon two important issues under Section 7 should be clarified by this Court because of the increasing importance of the question in the administration of the Act. The instant case raises the issues squarely and presents an appropriate occasion for their decision.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

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